United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1543

to be argued by KATHERINE WINFREE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

NICHOLAS ALBERTI,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

RICHARD J. ARCARA
United States Attorney,
Western District of New York,

JEROME M. FEIT
KATHERINE WINFREE
Attorneys,
Department of Justice,
Washington, D.C. 20530.

TABLE OF CONTENTS

CITATIONS

Cases:

Page

Cases:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-1543

UNITED STATES OF AMERICA,
Appellant

v.

NICHOLAS ALBERTI,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

ISSUES PRESENTED

1. Whether the district court erroneously granted a new trial where it did not find actual prejudice, but found only "the potential for substantial prejudice" arising from a newspaper article terming defendant "a minor organized crime figure," which was published shortly before the case was submitted to the jury.

2. Whether the district court erred in striking from the indictment certain portions of defendant's grand jury testimony on the basis that the matter stricken could not support his conviction for perjury.

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, defendant was convicted of wilfully and knowingly making false material declarations under oath before a grand jury, in violation of 18 U.S.C. 1623. On September 30, 1976, the district court (Curtin, C.J.) granted defendant's motion for a new trial because of publicity which occurred shortly before the case was submitted to the jury, and sua sponte struck certain portions of the defendant's grand jury testimony from the indictment for purposes of retrial. We ask this Court to review that order.

1. The evidence shows that on October 16, 1974, defendant appeared before a United States Grand Jury in the Western District of New York which was then investigating illegal gambling (18 U.S.C. 1955), loansharking (18 U.S.C. 891, et seq.), and racketeering activity (18 U.S.C. 1961, et seq.). It was material to the grand jury investigation to determine inter alia whether a ziganette[1/] card game was conducted at Nairy's Social

1/ By way of explanation, ziganette is a high stakes card game (Tr. 400). It can be played by a maximum of ten players including the dealer (Tr. 186, 400), and is played with a deck in which all the eights, nines and tens have been removed (Tr. 187, 400). The object of the game is for a dealer's card to be matched before that of a player's (Tr. 400-401). A "house dealer," who does not actually play the game, functions as a general overseer of the game (Tr. 187, 400). The house dealer begins the game by dealing cards to all the prospective players of a game. The first one to receive a king becomes the game dealer. The cards are then reshuffled and the house dealer turns over three cards. Two are given to the two players to the left of the now designated game dealer and the third to the game dealer himself (Tr. 188-189, 400-401). The game dealer then indicates how much he wants to wager per card, and bets are placed down (Tr. 192, 401). The game dealer is then given the rest of the deck by the house dealer and proceeds to turn over cards, hoping to match (footnote continued on next page).

Club in Buffalo, New York, whether large sums of money were wagered during that game, and whether certain persons received a percentage of the bets placed (Tr. 337-338). In response to questioning before the grand jury, defendant who had been afforded immunity told the grand jury that he had never seen a high stakes ziganette game being played at Nairy's nearly 24 hours a day (App. 23; Tr. 160-161). He also denied knowledge of one Michael Bona's connection with the game, of the dealers involved in the game,[2] and of the percentage taken from the wagers as the house share (App. 26-27; Tr. 162-163).

This testimony was flatly contradicted by the evidence adduced by the government. This evidence showed that in fact defendant frequently served as "setup man" - i.e., one who brings coffee, sandwiches, cold drinks and cigarettes to the participants of the ziganette games played at Nairy's Social Club (Tr. 205, 213, 219, 229, 233, 236, 407, 412, 416-417, 425, 427, 431, 448).

Operating in this capacity, defendant was required to stand behind the table, watching closely so that he did not interfere with the play of the game (Tr. 407-408, 412, 420). Defendant

1/ (footnote cont'd)
each player's cards before his own card is matched (Tr. 401). If a dealer's hand is matched during the game he puts up the money he wagered to pay his debt, and the deal passes down to the next player (Tr. 440-441). At Nairy's, when the dealer won from a player, the house dealer took out a five percent "rake" (Tr. 187, 419). Additional persons, called "plungers," could also place bets, although they did not participate in the actual card game (Tr. 249-250, 411).

2/ The deal of the ziganette game was initiated by the "dealer" or "houseman;" thereafter, the deal rotated with the play (Tr. 195, 242, 400, 405).

was present on several occasions when Michael Bona supervised the game, maintained order, settled disputes, loaned and collected money from the players (Tr. 224, 226, 228, 231-232, 239, 422-423).

On one occasion when $1,000 were wagered in one hour, with the highest hand approximately $400, defendant acted as setup man[3/] (Tr. 419, 423). During another game, the betting approached $2,000, and the largest winning hand was $680 (Tr. 426). The evidence further established that the ziganette game was played at various hours of the day and night at Nairy's, continuing as long as 22 hours (see, e.g., Tr. 410, 417, 421, 426-430, 437-438).

2. After summations on Friday, June 11, 1976, the jury was dismissed for the weekend, to return the following Monday for instructions and deliberation (Tr. 556-557). The Friday evening edition of a local newspaper contained an article[4/] which referred to the defendant as a "minor organized crime figure" (App. 76). On Monday, June 14, 1976, defense counsel advised the court of this article (App. 67-68; Tr. 560-561). The prosecution suggested questioning the jury as to whether they had seen the article and, if there were affirmative responses, further questioning of those individuals who had given affirmative responses (App. 69; Tr. 562). When the court expressed concern

3/ On at least one occasion, defendant also served as "doorman" controlling access of the double doors locked during progress of the ziganette game (Tr. 206, 446).

4/ Defendant did not take issue (App. 67; Tr. 560) with a second article which related the testimony heard at trial (App. 75).

that such inquiry would serve only to emphasize the publicity, defense counsel moved for a mistrial, which was denied (App. 69-70; Tr. 562-563). When the defense requested a cautionary instruction (App. 70; Tr. 563), the court agreed to question the jury in accordance with the prosecution's earlier suggestion (Ibid.). After the jury was summoned to the courtroom, the court cautioned them to disregard any publicity (App. 74, Tr. 567), and proceeded with the charge (Tr. 567-592), apparently forgetting to ask about the article. The case was then submitted to the jury, which returned a guilty verdict (Tr. 595).

3. On June 18, 1976, defendant moved for a judgment of acquittal or, in the alternative, for a new trial on the basis of the allegedly prejudicial publicity. On September 30, 1976, the district court ordered that a new trial be held because of the "possibility of substantial prejudice" resulting from the publicity (App. 90). The court stated (App. 91):

> The court had agreed to question the jurors, but then failed to do so. It is not the Government's fault that this omission occurred. The defendant's counsel should have brought it to the court's attention. Nonetheless, the court believed at the time that the additional voir dire should have been conducted and inadvertently failed to carry out its intention. Had the jury been questioned, it is probable that curative instructions, if needed, could have been given. Since the potential for substantial prejudice existed, and it cannot be determined whether there was actually substantial prejudice to the defendant or not, the defendant should be granted a new trial.

Additionally, the court sua sponte struck from the indictment, for purposes of retrial, certain portions which it ruled could

not support a conviction for perjury (App. 84-85, 91-92).[5/]

ARGUMENT

I. THE ORDER OF THE DISTRICT COURT GRANTING THE MOTION FOR A NEW TRIAL IS APPEALABLE BY THE GOVERNMENT UNDER 18 U.S.C. 3731.

Before turning to the merits of this case, we first address the threshold question whether the government has the statutory right to appeal. We submit that recent decisions of the Supreme Court make clear that the appeal here is authorized under 18 U.S.C. 3731[6/] despite the absence of explicit words in the statute to that effect. This is so because it is "clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337 (1975). In Wilson, the Supreme Court stated "that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." Id. at 352-353. The same is true here. If we prevail on the merits the jury verdict of guilty will be reinstated and the defendant will neither be subject to double punishment for the same offense nor be subject to a second trial on the same charges. See also, United States v. Jenkins, 420

5/ These portions are set forth in detail in our Argument III, infra.

6/ 18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing
> (footnote continued on next page).

U.S. 358, 365 (1975); Serfass v. United States, 420 U.S. 377 (1975); United States v. Sanford, ____ U.S. ____, 97 S.Ct. 20 (No. 75-1867, decided October 12, 1976); United States v. Morrison, ____ U.S. ____, 97 S.Ct. 24 (No. 75-1534, decided October 12, 1976); United States v. Rose, ____ U.S. ____, 97 S.Ct. 26 (No. 75-1535, decided October 12, 1976).

II. THE DISTRICT COURT APPLIED AN ERRONEOUS STANDARD IN HOLDING THAT A NEW TRIAL IS REQUIRED WHEN THE POTENTIAL FOR SUBSTANTIAL PREJUDICE EXISTS.

1. In cases of prejudicial publicity, "a new trial is required only when substantial prejudice [to the defendant] has occurred," United States v. D'Andrea, 495 F.2d 1170, 1172 (3rd Cir.), cert. den., 419 U.S. 834 (1974) and the burden is on the defendant to demonstrate such prejudice.[7/] Id. at 1172 n.5;

6/ (footnote cont'd)

> an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

7/ An exception to this rule is the rare and unusual case where the publicity that occurs is so fundamentally and inherently prejudicial that actual prejudice is presumed. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966)(editorial comment about defendant's guilt); Estes v. Texas, 381 U.S. 532 (footnote continued on next page).

United States v. Cimini, 427 F.2d 129, 130 (6th Cir.), cert. den., 400 U.S. 911 (1970); Gordon v. United States, 438 F.2d 858, 873-874 (5th Cir.), cert. den., 404 U.S. 828 (1971); United States v. Brasco, 385 F.Supp. 966, 972 (S.D.N.Y. 1974), aff'd 516 F.2d 816 (2nd Cir. 1975) cert. den., 423 U.S. 860. The law will not presume either that the jury ignored the court's instructions,[8/] cf. Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485 (1933); United States v. Palmieri, 456 F.2d 9, 13 (2nd Cir. 1972), cert. den., 406 U.S. 945; Gordon v. United States, supra, 438 F.2d at 873-874, or that they were prejudiced by the publicity, cf. United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1956); Gordon v. United States, supra, 438 F.2d at 874.

In his motion for a new trial, defendant failed to show "as a demonstrable reality" (United States ex rel. Darcy v. Handy, supra, 351 U.S. at 462) that the jury in this case was prejudiced by the article. The defendant made no such showing by affidavit or otherwise; nor did he request a post-verdict examination of the jury. Instead, he relied on a bare allegation

7/ (footnote cont'd)
(1965) (televising and broadcasting of trial); Rideau v. Louisiana, 373 U.S. 723 (1963) (televising of motion picture of defendant's "confessing" to sheriff); Marshall v. United States, 360 U.S. 310 (1959) (defendant's past crimes unrelated to the present charge). The publicity resulting from the passing reference to defendant in the newspaper article involved here is wholly unlike the kind in these unusual cases. Indeed, this Court has so held with regard to similar publicity. See United States v. Persico, 425 F.2d 1375, 1382 (2nd Cir.), cert. den., 400 U.S. 869 (1970) (inter alia, reference to "Cosa Nostra").

8/ At the outset of the trial, the court admonished the jury to disregard any publicity (Tr. 98-99). This cautionary instruction was repeated at the close of the evidence and prior to summations (Tr. 491), and again at the beginning of the court's charge (Tr. 567).

of prejudice and the court's failure to poll the jury, an omission which defendant "should have brought [ ] to the court's attention" (App. 91) and from which he should not be allowed to profit. In these circumstances, it was error for the district court to grant a new trial.

2. In any event, there was only the remotest of possibilities that defendant was prejudiced by the newspaper article, which concerned one Sam Pieri and his connection with gambling clubs in Buffalo. It contained only a passing reference to the defendant (App. 76):

> The first trial stemming from that investigation [of Buffalo gambling clubs] - a perjury case against Nicholas Alberti, identified as a minor organized crime figure - was scheduled to go to the jury in Federal Court today.

Thus "taking the publicity at its worst, "United States v. Persico, supra, 425 F.2d at 1380, any possible prejudice was restricted to the characterization of the defendant as "a minor organized crime figure." Cf. United States v. D'Andrea, supra, 495 F.2d at 1172 ("gang figure," in headline; "reputed underworld figure," in body of article). Moreover, this limited publicity occurred "at a time when its prejudicial impact was likely to be minimal." United States v. D'Andrea, supra, 495 F.2d at 1173. It was not published until the close of evidence, during which the jury heard that defendant was called before the grand jury to testify concerning his knowledge of illegal gambling activities (Tr. 338-340). "As a result the jurors were thoroughly familiar with the defendant and the case, and were less likely to be

influenced by the brief characterization of the defendant." Id. Additionally, it is of significance in assessing the impact of the incident that the publicity did not emanate from the Government (see App. 69; Tr. 562). United States v. Agueci, 310 F.2d 817, 832 (2nd Cir. 1962), cert. den., 372 U.S. 959 (1963).

Because there was no substantial reason to fear prejudice, it would have been well within the court's discretion to decline to poll the jury. United States v. Caci, 401 F.2d 664, 672 (2nd Cir. 1968), cert. den., 394 U.S. 917 (1969) (prior to charge, radio broadcast referring to defendants as having been linked to the Cosa Nostra); United States v. Edwards, 366 F.2d 853, 873 (2nd Cir. 1966), cert. den. sub. nom. Parness v. United States, 386 U.S. 919 (1967).[9/]

Accordingly, this case amounts in reality to nothing more than a situation in which a court inadvertently neglects to give an accused more than his due.[10/] And while the trial court apparently based its ruling on the fact that "[h]ad the jury been questioned, it is probable that curative instructions, if needed, could have been given" (App. 91), that concern was unwarranted since strong

9/ The district court's reliance (App. 90-91) on United States v. Hankish, 502 F.2d 71 (4th Cir. 1974) in holding that his failure to poll the jury required a new trial is misplaced. The article involved in that case was of a clearly different nature, describing defendant as a "Wheeling rackets figure" and director of a multistate theft ring who lost both legs "when his car was blown up in gangland fashion." Id. at 76. The Fourth Circuit there recognized that not "every newspaper article appearing during trial requires such protective measures. Unless there is substantial reason to fear prejudice, the trial judge may decline to question the jurors." Id.

10/ It is noteworthy that the defense permitted the failure of the court to question the jurors, despite the court's timely invitation for further requests (Tr. 592).

cautionary instructions were actually given (Tr. 567).

Finally, on this point, in light of the substantial evidence establishing the defendant's guilt any defect here was minimal and if error resulted it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); United States v. Palmieri, supra, 456 F.2d at 14 (jury's reading of article reporting arrest of defendant - on trial for extortionate credit conspiracy - outside courtroom on charge of bribing government witnesses held to be harmless error).[11/]

11/ Even if this Court is of the view that a post-verdict inquiry should have been made of the jury, the remedy of a new trial is not justified. The court below should instead have conducted a post-verdict inquiry. This procedure was employed in United States v. Brasco, supra, 385 F.Supp. at 969-970. In that case, the district court conducted a post-conviction evidentiary hearing, at which each juror was questioned as to whether he had read a newspaper account directed at the defendant's failure to testify at trial. Based on this inquiry, the court determined that no juror had been exposed and that, even assuming contact, no prejudice resulted. Id. at 972. Even at this juncture, if this Court were to reject our main argument, it should not affirm but remand for such a hearing. The inquiry could be limited to a factual determination as to whether any juror was exposed and, if exposed, influenced by the publicity. Cf. United States v. McKinney, 429 F.2d 1019, 1030-1031 (5th Cir. 1970), cert. den., 401 U.S. 922; United States v. Rocks, 339 F.Supp. 249, 254 (E.D. Va.), aff'd, 481 F.2d 112 (4th Cir. 1973). See also Downey v. Peyton, 451 F.2d 236, 239-240 (4th Cir. 1971).

III. THE DISTRICT COURT ERRED IN STRIKING CERTAIN QUESTIONS AND ANSWERS FROM THIS PERJURY INDICTMENT

The indictment returned against the defendant set forth several portions of his grand jury testimony pertaining to four issues material to the grand jury investigation. The first group of questions probed the defendant's knowledge of ziganette card games played at Nairy's Social Club (App. 59). The second group concerned the activities and participation in the game of a Mr. Bona (App. 59-60). The third and fourth groups, respectively, involved defendant's knowledge as to whether there was a fixed percentage of the amounts wagered cut by the house as profit for operating the game, and defendant's knowledge of the dealers of the game (App. 60).

The district court held that the third and fourth groups of questions - those concerning the house take and the identity of the dealers - were sufficiently succinct and direct, and that defendant's answers could support a conviction (App. 85-87).[12/]

The court, however, struck from the indictment the first and parts of the second group of questions (App. 82-84; 91). We submit that this ruling was erroneous.

1. The first group of questions was as follows:[13/]

Q. Do they play some game called siginete?

12/ The district court made these findings, and those discussed infra, in connection with defendant's posttrial motion for judgment of acquittal.

13/ Relying on phonetics (Tr. 174-176), the grand jury stenographer spelled the word "siginete" while it was spelled "ziganette" in the indictment. Prior to trial, the court denied defendant's motion to dismiss on that ground and held that the indictment was sufficient (App. 63-65). As the court noted (App. 92 n.2), there is some confusion as to the spelling, and it appears as "ziginette" in the trial transcript.

A. Siginete?

Q. Yes, that is a high stakes card game.

(1) A. Not necessarily, no.

Q. It isn't?

(2) A. I haven't seen any game of siginete. Every time I go in there, the doors are open. You can go in there anytime. I go in there and have coffee, watch TV like a lot of other people do.

Q. Isn't it true, Mr. Alberti, that there is a high stake siginete game that is in operation at that club almost twenty-four hours a day?

(3) A. I have never seen one. I have never seen one, sir. I don't recall ever seeing one.

The court found that answer (1), although misleading, was not false and that answer (2) was unresponsive (App. 83). The court therefore held that "the imprecision and the ambiguity in the Government's questioning remove any basis for a conviction of perjury" (App. 84). This conclusion fails upon close analysis. Answer (1) strongly suggests that defendant was familiar with ziganette, for he indicated it was "[n]ot necessarily" a high stakes game. Question and answer (2) relate back to the first question and set the foundation for defendant's denial in answer (3) of seeing a ziganette game at Nairy's. In short, these questions and answers deemed imprecise and ambiguous by the court below were actually the predicate for question (3) and indicate the context in which the defendant made materially false statements in answer (3). This Court has approved the practice of including in the indictment "enough of the testimony surrounding the allegedly false

statements to place them in coherent context." United States v. Bonacorsa, 528 F.2d 1218, 1221 (2nd Cir.), cert. den., ____ U.S. ____, 96 S.Ct. 2647 (1976). See also Stassi v. United States, 401 F.2d 259, 269 (5th Cir.), vacated on other grounds sub nom. Giordano v. United States, 394 U.S. 310 (1968) ("better practice, both from the standpoint of the Government and the defendant"). Because questions and answers (1) and (2) place question and answer (3) in coherent context, the court struck them from the indictment on the erroneous theory that since they alone could not sustain a conviction for perjury, they had no place in the indictment.[14/]

With regard to the final question and answer in this group, the court held "answer (3) is literally true for three reasons - [defendant] testified [before the grand jury] that he was not at Nairy's around the clock, the evidence did not show that the ziganette game was in operation continuously, and the evidence showed that not all the games were for high stakes" (App. 84). The court misinterpreted both the question and the proof presented at trial. Defendant's twenty-four hour presence at Nairy's was not essential to the falsity of his answer, since the question requests the state of his knowledge, not the extent of his presence at Nairy's, nor was it essential that

14/ Nor should they have been stricken, as the court below believed (App. 80-82), under the Supreme Court's decision in Bronston v. United States, 409 U.S. 352, 361 which found that the federal perjury statute did not reach "answers unresponsive on their face but untrue only by 'negative implication.'"

The questions and answers at issue here do not fall within the Bronston rule. As we have demonstrated the first two were essentially foundation for the critical third question and answer (footnote continued on next page).

the government prove the game was played continuously. The phrase "almost twenty-four hours a day" was obviously used as a figure of speech to mean occurring most of the time day or night or occurring quite frequently. "[T]he * * * interpretation placed upon the question by the defendant at the time of the alleged prevarication * * * is an issue for the jury...." United States v. Corr, slip op., No. 76-1116, (2nd Cir., decided October 22, 1976), pp. 5904-5905; see also Bonacorsa, supra, 528 F.2d at 1221.

The evidence established that defendant was present at various times of the day and night when ziganette was being played (e.g., Tr. 219-220, 231, 234, 410, 417, 421). On one occasion, defendant was there when the game continued from early evening through the night (Tr. 426-430). Additionally, there was testimony that this game had lasted as long as 22 hours (Tr. 437-438). From this evidence, the jury reasonably could infer that the defendant was aware of and knew that ziganette was being played on a regular basis during most hours of the day or night. Similarly, the question does not require proof that all ziganette games at the Club were for high stakes; rather it asks whether defendant was aware of such a high stake game. Moreover, the game was described at trial as "high stake" (Tr. 400). The evidence established that on one occasion, the average amount bet per card was $50 to $75 (Tr. 234) and that defendant was present on days when the wagers approached $1,000 and $2,000 an hour.

14/ (footnote cont'd)
which, contrary to the court below, were sufficiently clear and precise to support a perjury conviction.

It is clear that the grand jury was attempting to ascertain whether defendant had knowledge that a high stakes ziganette game was played at Nairy's Social Club on a more or less regular, continuous basis. "When viewed with anything but the partisan eye of an advocate, the questions, as they followed one upon the other, were pointed toward the development of this information." United States v. Bonacorsa, supra, 528 F.2d at 1221. Taken together, the questions were not fatally ambiguous or imprecise, but were subject to a reasonable and definite interpretation (United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. den., 423 U.S. 1015 (1975)), and therefore "the meaning and truthfulness of [defendant's] answers was for the jury" (Id.; United States v. Wolfson, 437 F.2d 862, 878 (2nd Cir. 1970)) and not for the court to decide.

2. The second group of questions concerned Mr. Bona's connection with the ziganette game:

Q. What does Mr. Bona do for a living?

A. I don't know.

Q. He is at the club everyday; isn't he?

A. I don't know if he is at the club everyday. I don't know any activities that the man is in.

Q. Does he have anything to do with the siginete game?

A. Not to my knowledge.

Q. Nothing to do whatsoever with the siginete game.

A. No, not to my knowledge.

As to these questions, the court held (App. 85):

> "There was no evidence with regard to Mr. Bona's occupation, nor was there evidence that [the defendant] was at the club every day. On these questions, there was not sufficient evidence to support a perjury conviction. * * * [T]he remaining questions, dealing with [defendant's] knowledge of Bona's participation in ziganette games at Nairy's * * * are sufficiently direct and unambiguous."

The proof showed that in defendant's presence Bona supervised the ziganette game, maintained order, and loaned and collected money from the players (Tr. 224, 226, 228, 231-232, 239, 422-423) and was sufficient to establish that Bona ran the card game for a living. It was therefore a jury question whether defendant falsely stated he did not know what Bona did for a living.[15/] In any event, this

15/ If defendant is retried he would have recourse to a motion to withdraw from jury consideration any specific assignment of perjury not supported by the evidence. See United States v. Bonacorsa, 528 F.2d at 1222; United States v. Natelli, 527 F.2d 311, 328 (2nd Cir. 1975), cert. den., 425 U.S. 934 (1976); United States v. Mascuch, 111 F.2d 602, 603 (2nd Cir.), cert. den., 311 U.S. 650 (1940).

question and the succeeding one (to which defendant replied "I don't know any activities that the man is in") place in coherent context the questions and answers relating to Bona's participation in the ziganette game, which the court held were sufficiently precise (App. 85). As such, they are properly included in the indictment. United States v. Bonacorsa, supra, 528 F.2d at 1221.

In sum, the district court applied a clearly erroneous standard in striking material from the indictment as imprecise and incapable of supporting a conviction of perjury, and the decision goes well beyond the permissible practice of striking "surplusage" from the indictment and "may work an impermissible 'fundamental change' in the charge set forth in the indictment even though a legally sufficient allegation remains." United States v. Cirami, 510 F.2d 69, 72 (2nd Cir.), cert. den., 421 U.S. 964 (1975).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court should be reversed and the case remanded with directions that the defendant's conviction should be reinstated and he should be sentenced. If, however, this Court determines that defendant is entitled to a new trial, that part of the district court's decision striking portions of the indictment should be reversed, and the case remanded for a new trial under the indictment as originally returned.

RICHARD J. ARCARA
United States Attorney,
Western District of New York,

JEROME M. FEIT
KATHERINE WINFREE
Attorneys,
Department of Justice,
Washington, D.C. 20530.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date copies of the foregoing brief have been mailed to counsel for the appellee at the following address:

Brian F. Toohey, Esq.
70 Niagara Street
Buffalo, New York 14202

Dated this 31st day of January, 1977.

Katherine Winfree
KATHERINE WINFREE, Attorney
Appellate Section
Criminal Division
U.S. Department of Justice
Washington, D.C. 20530